IN THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MARYLAND

SYLVIA WASSERMAN :

v. : Civil No. HM80-1988

IRWIN WASSERMAN, :
et al.

...o0o...

M E M O R A N D U M

Plaintiff Sylvia Wasserman has brought this action against her ex-husband, Irwin Wasserman, other members of the Wasserman family, and three attorneys, Irwin Liptz, Armand Robinson and Murray Kivitz. Count I of the complaint alleges that Irwin Wasserman removed three of the four Wasserman children from Plaintiff's rightful custody with the full knowledge and connivance of the other defendants, that this was done with full awareness by defendants of plaintiff's lack of consent, and that defendants prevented said children from contacting plaintiff by any

means and endeavored to conceal the children's whereabouts from plaintiff. Count II alleges that defendants engaged in this conduct in order to interfere with the parent-child relationship of plaintiff with the children and to prejudice plaintiff's position as a litigant in a pending divorce proceeding (at that time) by forcing plaintiff into a settlement, all of which resulted in a considerable pecuniary loss to plaintiff and physical and psychological distress as well. Count III charges the defendants with civil conspiracy to interfere with the rightful and lawful relationship between plaintiff and the three children "by unlawful means when the minor children of the plaintiff were by force, persuasion and false pretenses abducted and enticed away from the plaintiff, who at the time of this occurrence, had the lawful and sole custody of the three minor children. . . ."

Compl. para. 13. The commplaint also asserts that, pursuant to a decree of the Circuit Court for Montgomery County dated June 8, 1976, sole custody of all four children was granted to the plaintiff, during the pendency of the aforementioned divorce proceedings, which resulted in a decree of divorce dated June 8, 1978.

Defendants have moved to dismiss the complaint on various grounds, the principal contention being lack of subject matter jurisdiction in the federal court. The complaint, although erroneously asserting 28 U.S.C. §§ 1331 and 1391 as jurisdictional bases, is really brought under the diversity provision, 28 U.S.C.§ 1332. The thrust of defendants' motions to dismiss is the by now well-settled principle that federal courts should be reluctant to exercise jurisdiction in cases involving domestic relations, even though diversity of citizenship exists. This exception

to the diversity jurisdiction is not statutory in origin, but is rather a judge-made doctrine stemming from two nineteenth century decisions of the Supreme Court.

In dicta contained in the opinion of the Court in Barber v. Barber, 62 U.S. 582, 584 (1859), the Supreme Court stated that the federal courts have no jurisdiction over suits for divorce or the allowance of alimony incident to divorce. The second case, In re Burrus, 136 U.S. 586 (1890) involved, as does the case at bar, a dispute over child custody, and the Court therein stated, "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States." Id. at 593-94.

Subsequent decisions in the lower federal courts have construed Barber and Burrus as prohibiting federal jurisdiction in domestic relations cases in general,

and child custody cases in particular. See, e.g., Delavigne v. Delavigne, 402 F. Supp. 363, 366 (D. Md. 1975), aff'd, 530 F.2d 598 (4th Cir. 1976); Cherry v. Cherry, 438 F. Supp. 88, 89-90 (D. Md. 1977). See also Wilkins v. Rogers, 581 F.2d 399, 403-04 (4th Cir. 1978); Spindel v. Spindel, 283 F. Supp. 797 (E.D. N.Y. 1968) (setting forth, in detail, the history of the domestic relations exception); 13 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3609 (1975 & Supp. 1980).

The principles underlying the domestic relations exception are judicially sound. We begin, of course, with Justice Holmes' observation in Ohio ex rel. Popovici v. Agler, 280 U.S. 379, 383-84 (1930):

> If when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States, there is little difficulty in construing the instrument accordingly. . . .

After discussing the Supreme Court decisions in detail, the Third Circuit Court of Appeals in Solomon v. Solomon, 516 F.2d 1018, 1024-25 (1975) said:

> Our understanding of these cases requires us to conclude that the district court properly refused to exercise jurisdiction over the instant case. The import of the Supreme Count's language in these cases is that the federal courts do not have jurisdiction in domestic relations suits except where necessary to the effectuation of prior state court judgments involving the same matters or where jurisdiction lies by dint of the participation and review of territorial courts. . . .
>
> * * * *
>
> In holding that the domestic relations doctrine applies to the case before us, we do not mean to suggest that a separation agreement may never be litigated in the federal courts by parties between whom there is diversity of citizenship. In a different case, in which the custody of no child was involved, in which there was neither pending state court action nor an agreement to litigate in the state courts,

> and in which there was no threat that a feuding couple would play one court system off against the other, we might well assume jurisdiction. . . .
>
> The domestic relations exception to the jurisdictional powers of federal courts represents an historically engrained limitation upon us. It is true that the rationale upon which it is premised has shifted from conceptions regarding the powers of ancient ecclesiastical courts, . . .the non-diversity of married couples and the lack of monetary value of a divorce, . . .to the modern view that state courts have developed both a well-known expertise in these cases and a strong interest in disposing of them. See C. Wright, Handbook of the Law of Federal Courts 84 (2d ed. 1970) . . . (Emphasis supplied)

Yet another equally valid underlying justification for the domestic relations exception is the efficient administration of justice in federal courts. Our court of appeals has recently noted, in Cole v. Cole, 633 F.2d 1083, 1088 (4th Cir. 1980), the concerns expressed by other district judges within this circuit, such as that

which motivated Chief Judge Northrop, in Cherry v. Cherry, supra, to refuse "to increase the workload of this already overburdened court by ignoring a rule that has existed for over 100 years without any intimation of Congressional disapproval", or the concern that gave rise to the following observations by Judge Hemphill in Thrower v. Cox, 425 F. Supp 570, 573 (D.S.C. 1976):

> Domestic relations matters, such as divorce and child custody, are very common types of litigation which, even with the diversity requirements, would greatly increase the workload of an already overburdened court system. The nature of domestic relations law is such that this is not merely a recapitulation of the old "floodgates" argument. In granting alimony and deciding matters of child custody, the court must retain jurisdiction and freqeuntly reconsider the case to determine if changed circumstances warrant a change in the original decree. This requires constant supervision of the court, Additionally, in order to perform the job adequately, state family courts out of necessity

> frequently work in close conjunction with social welfare agencies which assist them in carrying out their functions. Such assistance is not presently available in the federal system, nor do we need to create an additional bureaucracy to needlessly complicate these state services. Perhaps the most convincing evidence that the federal courts should refuse jurisdiction in this area is the state's own treatment of this type of litigation. The field of domestic relations is so vexatious, timeconsuming and specialized that virtually every state in the Union has established a separate system of family courts to prevent their own trial courts from being overburdened. As it has done consistently in the past, the federal court system should allow them that dubious honor exclusively.

The federal-court cases cited by plaintiff do not alter the correctness of these principles. Abdul-Rahman Omar Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961) was a decision of Judge Thomsen in a case brought under the Alien Tort Statute, 28 U.S.C. § 1350; in that case, Judge Thomsen weighed the above-mentioned prudential considerations against the

palpable federal interest in adjudicating questions of nationality and entry into the United States, as well as relations with the foreign nation of which the plaintiff was a domiciliary. In contrast, the issue of domestic relations exception was not even considered by the court in Kajtazi v. Kajtazi, 488 F. Supp. 15 (E.D. N.Y. 1978), but insofar as the court's silence in that case can reasonably be interpreted as a contrary result, this court declines to follow it, particularly in the light of a decision by the circuit court which holds dominion over the district in which Kajtazi was decided adopting the position taken herein. Hernstadt v. Hernstadt, 373 F.2d 316 (2d Circ. 1967).

The case at bar, though couched in terms of a series of intentional torts, is fundamentally concerned with alleged abridgment of the parent-child relationship. Permitting actions such as this to

be maintained in a federal court sitting in diversity would invite any party to a domestic squabble to render the domestic relations exception a nullity merely by deft turns of phrase and ingenious legal theories. This court will not countenance such a result.

For the foregoing reasons, this court will grant the motions to dismiss for lack of subject matter jurisdiction.

Dated: May , 1981

United States District Judge

IN THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MARYLAND

SYLVIA WASSERMAN :

v. : Civil No. HM80-1988

IRWIN WASSERMAN :
et al.

...oOo...

O R D E R

For the reasons outlined in the foregoing memorandum, it is this ____ day of May 1981, by the United States District Court for the District of Maryland,

ORDERED:

(1) that defendants' motion to dismiss for lack of subject matter jurisdiction be, and the same hereby is, Granted; and

(2) that the Clerk of the Court mail copies of this memorandum and order to Counsel for the parties.

United States District Judge

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 81-1591

Sylvia Wasserman,

Appellant,

vs.

Irwin Wasserman, et al.,

Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore, Herbert F. Murray, District Judge.

Argued January 4, 1982 Decided February 24, 1982

Before WINTER, Chief Judge, BUTZNER, Circuit Judge, and INGRAHAM,* Senior Circuit Judge.

(Stuart M. Salsbury, Israelson & Jackson, P.A. on brief) for Appellant; (Nell B. Strachan, James K. Archibald; Sheldon H. Braiterman; Armand Robinson on brief) for Appellees.

---

*Honorable Joe M. Ingraham, Senior United States Circuit Judge for the Fifth Circuit Court of Appeals, sitting by designation.

INGRAHAM, Circuit Judge:

Sylvia Wasserman appeals from the dismissal of a diversity suit against her former husband and other defendants in which she had alleged the defendants removed, or assisted in removing, her children from her custody without her consent during the Wassermans' divorce proceedings in 1977 and 1978. The district court dismissed the complaint for lack of subject-matter jurisdiction, describing the suit as a "dispute involving child custody," and thus within the domestic relations exception to federal diversity jurisdiction. We reverse and remand for further proceedings.

I. Background[1/]

Appellant Sylvia Wasserman is the former wife of appellee Irwin Wasserman. The Wassermans are the parents of four minor children. In addition to appellee Irwin Wasserman the complaint also named Irwin's present wife, his parents and the attorneys who represented him in the divorce and related proceedings during the periods relevant to the complaint.

On June 8, 1976, the Circuit Court for Montgomery County, Maryland, granted custody of the minor Wasserman children to appellant for the duration of the proceedings then underway. The final decree of divorce was eventually granted on June 8, 1978. On December 14, 1977, appellee Irwin Wasserman removed the three youngest children from appellant's custody (with the alleged knowing assistance of the other appellees) and took

---

1/ For purposes of reviewing the motion to dismiss, we accept as true the facts as alleged in the complaint. Coles v. Havens Realty Corp., 633 F.2d 384, 386 (4th Cir. 1980), cert. granted, 101 S.Ct. 1972 (1981).

them outside the State of Maryland. From December 14, 1977 until March 9, 1978, the appellees allegedly prevented the children from returning to or contacting appellant and concealed their location from her. Appellant charged that these facts gave rise to three causes of action: child enticement; intentional infliction of emotional distress; and civil conspiracy.

Appellees filed motions to dismiss and supplemental motions to dismiss urging, among other grounds, that the district court lacked subject-matter jurisdiction because the suit involved domestic relations matters. After a hearing was held on these motions on May 11, 1981, the district court dismissed the suit by memorandum order dated May 12, 1981.

II. Discussion

As the district court correctly observed, the federal courts have long held that diversity jurisdiction does not include the power to grant divorces, determine alimony or support obligations, or determine child custody rights. See Sutter v. Pitts, 639 F.2d 842, 843 (1st Cir. 1981); Cole v. Cole, 633 F.2d 1083, 1087 (4th Cir. 1980); Wilkins v. Rogers, 581 F.2d 399, 403-04 (4th Cir. 1978). This doctrine, referred to as the domestic relations exception, is generally thought to originate in the dicta of two early Supreme Court cases, Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1858), and Ex Parte Burrus, 136 U.S. 586 (1890). While the supposed origin and nature of the doctrine has not escaped exacting criticism, see, e.g., Solomon v. Solomon, 516 F.2d 1018, 1027 (3d Cir. 1975) (Gibbons, J., dissenting); Spindel v. Spindel, 283 F.Supp. 797 (E.D.N.Y. 1968) (Weinstein, J.), it undoubtedly

survives as a limitation, in some form, on the exercise of diversity jurisdiction. Sutter v. Pitts, supra, 639 F.2d at 843; Phillips, Hizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 514 (2d Cir. 1973).

In this circuit application of the doctrine must be guided by the principles announced in Cole v. Cole, 633 F.2d 1083, 1087-89 (4th Cir. 1980). In Cole, a suit brought by the former husband against his ex-wife, the district court had dismissed claims of malicious prosecution and abuse of process, arson, conspiracy and conversion in the belief that the claims concerned matters of domestic relations. This court reversed, holding that:

> A district court may not simply avoid all diversity cases having intrafamily aspects. Rather it must consider the exact nature of the rights asserted or of the breaches alleged. . . . So long as diversity jurisdiction endures, federal courts cannot shirk the inconvenience of sometimes trading in wares from the foul rag-and-bone shop of the heart.

633 F.2d at 1088-89. Examining the claims alleged by Mr. Cole, the court found the suit did not present any true domestic relations issues.

In so holding, the Cole court made the following observations: "The duty to abstain from malicious prosecution, from abuse of process, from arson, and from conversion does not arise out of or require. . . a present or prior family relation"; "deciding this case would not require the court either to adjust family status or to establish duties under family-relations law or to determine whether or not such duties had been breached"; "the claims asserted could have arisen between strangers, and certainly between people with no marital relationship whatever"; and the asserted causes of action "do not require the existence of any rule particularly

marital in nature as a substantial ingredient to give them vitality." Id.

Applying these considerations to the case at hand we believe Cole compels the district court to entertain this suit. Appellant's complaint alleges generally cognizable common law torts.[2/] As in Cole, the previous marital relationship of the parties and the presumably strong feelings associated with that relationship may as a factual matter have contributed to the underlying events and initiation of this suit; however, the torts of child enticement and intentional infliction of emotional distress are in no way dependent on a present or prior family relationship. Furthermore, prosecution of these torts will not require the existence of any rule particularly marital in nature. Similarly, these claims could have arisen between persons with no marital relationship whatsoever and in fact have done so in this case in view of the allegations relating to appellees other than Irwin Wasserman.

Most importantly, appellant is not seeking a determination of entitlement to custody or any other adjustment of family status. This is manifestly not a case in which the parties actually seek a declaration of present or future rights as to custody or visitation. Cf. Doe v. Doe, 660 F.2d 101 (4th Cir. 1981) (writ

---

2/ We note only that child enticement and intentional infliction of emotional distress are generally cognizable torts. See generally Kajtazi v. Kajtazi, 488 F.Supp. 15, 18-21 (E.D.N.Y. 1978) (unlawful taking of child; intentional infliction of emotional distress); Harris v. Jones, 281 Md. 560, 380 A.2d 611 (1977) (intentional infliction of emotional distress); McBride v. Magnuson, 282 Or. 433, 578 P.2d 1259 (1978) (taking of child); W. Prosser, Handbook of the Law of Torts § 124 at 893-84 (4th Ed. 1971) (child enticement); RESTATEMENT (SECOND) OF TORTS, § 700 (1979) (unlawful taking of child). At this stage, of course, we offer no opinion as to the sufficiency or merit of these claims.

of habeas corpus not available to contest child custody); Gargallo v. Gargallo, 472 F.2d 1219 (6th Cir.), cert. denied, 414 U.S. 905 (1973); Hernstadt v. Hernstadt, 373 F.2d 316 (2d Cir. 1967). The only genuine custody issue - whether appellant was entitled to custody for all times relevant to the complaint - was definitively determined by order of the Circuit Court of Montgomery County in June of 1976. Appellees concede the existence of that decree and suggest neither an intent to challenge it or any way the decree is susceptible of such challenge insofar as it stated the rights of the parties during the relevant time period. Accordingly, this case, unlike Hernstadt, does not involve a custody decree still subject to review and modification.

As the Cole court observed, federal courts have often exercised diversity jurisdiction to rule on the validity of prior state decrees or to determine the existence of a breach of duties established in such decrees, especially when the duties are no longer subject to modification. 633 F.2d at 1087; cf. id. at 1088 n.5. See also Jagiella v. Jagiella, 647 F.2d 561 (5th Cir. 1981); Crouch v. Crouch, 566 F.2d 486 (5th Cir. 1978); Keating v. Keating, 542 F.2d 910 (4th Cir. 1976). The court below will not have to make a significantly more intrusive inquiry into the domestic relations of these parties than required in those cases.

REVERSED and REMANDED